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IN THE

Supreme Court of the United States

October Term, 1941.

No. 245

CUDAHY PACKING COMPANY OF LOUISIANA, LTD.,

Petitioner,

versus

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

BRIEF ON BEHALF OF CUDAHY PACKING COMPANY OF LOUISIANA, LTD., PETITIONER.

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Respondent.

BRIEF ON BEHALF OF CUDAHY PACKING COMPANY OF LOUISIANA, LTD., PETITIONER.

OPINIONS BELOW.

The decree of the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, in this matter, filed June 18th, 1940, appears in the Record at page 60-63, inclusive.

The opinion of the Court below, the Circuit Court of Appeals of the United States for the Fifth Circuit, filed April 19th, 1941, is reported in 119 Fed. (2) 209 (R. 70 and 71).

BASIS OF JURISDICTION.

Jurisdiction of this Honorable Court is invoked under Paragraph (a), Sec. 240 of the Judicial Code, as amended (Sec. 347, Title 28, U. S. C. A.).

The opinion of the Circuit Court of Appeals for the Fifth Circuit was filed April 19th, 1941; a petition for rehearing was filed May 8, 1941, and a rehearing was refused May 31st, 1941. Application for a stay of the mandate of the Court below, pending application in this Court for a writ of certiorari, was made on June 12th, 1941, and on the same date, an order staying its mandate for thirty days was entered by the Court below in order to enable Petitioner to apply to this Honorable Court for a writ of certiorari to review said decree of the United States Circuit Court of Appeals for the Fifth Circuit.

On October 13th, 1941, this Court granted the writ applied for herein.

STATEMENT OF THE CASE.

This is a matter which arises under the Act of June 25, 1938, c. 676, Sec. 1 *et seq.*, 52 Stat. 1060, (Title 28 U. S.

C. A. Sec. 201 *et seq.*) known as the "Fair Labor Standards Act of 1938". (R. 10-31 incl.)

On April 1st, 1940, one Robert T. Amis, styled as an officer of the Wage and Hour Division, United States Department of Labor (R. 46) issued to and served upon petitioner at its office in New Orleans, La., what purported to be a *subpoena duces tecum* calling for the production of the following books, papers and documents:

> "(1) Any and all books and records which record the wages paid to your employees employed in your plant in Shreveport, Louisiana, during the period from October 24, 1938, to March 23, 1940.
>
> "(2) Any and all books, documents, time cards, time sheets, papers, or memoranda made or kept by you which record the hours worked each workday and each workweek by your said employees during the period from October 24, 1938, to March 23, 1940.
>
> "(3) Any and all books, records, documents, receiving slips, invoices, or memoranda of purchases and shipments received by you during the period from October 24, 1938, to March 23, 1940.
>
> "(4) Any and all invoices, shipping receipts, copies of bills of lading, or other documents, records or memoranda pertaining to goods sold, shipped, delivered, transported, or offered for transportation from your said plant in Shreveport, Louisiana, during the period from October 24, 1938, to March 23, 1940."

before one Stephen R. Mac Rae, an officer of the Wage and Hour Division, Department of Labor, at its New Orleans Office (R. 47 and 48).

On April 6th, 1940, petitioner addressed a communication to the said Stephen R. Mac Rae, requesting "the names of the complaining parties, and the alleged violations on the part of this company". (R. 50 and 51.)

On April 15th, 1940, Messrs. Hartel & Sporl, a firm of Attorneys representing petitioner, also addressed a communication to the said Stephen R. Mac Rae, advising of the willingness of its client to "furnish you with the records covering said complaints if you will write us a letter setting out the names of the complaining parties and the alleged violations on the part of this company" (R. 49 and 50).

The Wage and Hour Division ignored completely the requests above set out and there then followed an application by a representative of the Administrator of the Wage and Hour Division to the United States District Court for the Eastern District of Louisiana, at New Orleans, for the issuance of a *subpoena duces tecum*, calling for the production of the records set out hereinabove (R. 2-10 incl.).

In paragraph VIII of the application, it is set out:

> "All books, papers and documents required to be produced by said subpoena duces tecum were, at the time of the issuance of said subpoena, and are now relevant, material, necessary and appropriate to determine whether respondent has violated Sections 7, 11 (c), 15 (a) (2) and 15 (a) (5) of the Act and will aid in the enforcement of the provisions of the Act." (Emphasis supplied.) (R. 7.)

In paragraph XI, the said application sets out that the records called for will assist in establishing the extent

of wage violations, "*if any*" by petitioner. (Italics supplied.) (R. 7.)

In paragraph XII, said application sets out that the records called for are necessary in order to determine "*whether any provisions of the Act* (the Fair Labor Standards Act) *have been violated*". (Italics supplied.) (R. 8.)

In paragraph XIII, the said application sets out that the records called for "will show the extent, *if any*, of the interstate business of respondent and whether the act covers the employees . . ." (Italics supplied.) (R. 8.)

On May 23rd, 1940, the District Court issued an order to petitioner requiring it to show cause on June 4th, 1940, why it should not produce the records set out above. (R. 52 and 53.)

In response to such order, petitioner filed a motion to dismiss and set out therein, among other things, the following:

> "That your mover is a corporation duly organized and existing under and by virtue of the laws of the State of Louisiana; that it is a separate and distinct entity, and is not a branch of any other corporation or corporations; that it is not engaged in the production of goods for commerce or in the transportation of goods in commerce, and that it is not engaged in any of the classes of businesses governed by the Fair Labor Standards Act of 1938. Act of 6/25/38 U. S. C. Title 29, Sec. S. E. C. 201 et seq." (R. 54).

On June 15th, 1940, one Henry T. Chambers filed an affidavit, in his capacity as a representative of the Ad-

ministrator, in which it is set out that he had received various complaints regarding violations of the Fair Labor Standards Act by petitioner and also that he had reasonable grounds to believe that the products handled by the Shreveport plant of petitioner are shipped in interstate commerce. (R. 57-59 incl.) On the trial of this cause, on motion filed by petitioner, the aforesaid affidavit was ordered stricken from the record.

Without permitting the trial of any of the issues raised by the pleadings herein, the District Court issued a decree ordering production of the records set out in paragraphs one and two, *supra*, (R. 60-63 incl.) but denied the application for production of records in paragraphs 3 and 4, *supra*.

From this order an appeal was perfected to the Circuit Court of Appeals of the Fifth Circuit, which Court affirmed the judgment of the District Court. On denial of an application for rehearing to the said Fifth Circuit Court, an application for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit was filed in this Court and granted on October 13th, 1941.

SPECIFICATION OF ERRORS.

I.

The Court below erred in holding that the Administrator issued the purported *subpoena duces tecum* herein and in failing to dismiss the action because the said subpoena

shows on its face that it is a nullity, not having been issued by the Administrator himself as required by the Act.

II.

The Court below erred in failing to dismiss the action in view of the requirement of Sec. 4 (b) of the Act that all litigation thereunder must be conducted under the direction and control of the Attorney General of the United States.

III.

The Court below erred in refusing to determine the issues raised by petitioner in its pleadings with respect to the denial by petitioner of the interstate nature of its business.

IV.

The Court below erred in failing to dismiss this action by reason of the fact that the purported subpoena, in its attempt to compel petitioner to permit the Administrator's agents to conduct an exploratory search in its records for the purpose of determining whether or not it has violated the Act, is violative of petitioner's rights as guaranteed by the Fourth Amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT.

1. The Administrator of the Fair Labor Standards Act of 1938 has no authority to delegate his power to issue *subpoenas duces tecum.*

Section 9 of the Fair Labor Standards Act of 1938.
Sections 9 and 10 of the Federal Trade Commission Act.
Fleming v. Lowell Sun Company, 120 Fed. (2nd) 213 (C. C. A. 1st Cir. 1941).

2. All litigation under the Fair Labor Standards Act must be under the direction and control of the Attorney General.

Section 4 (b) Fair Labor Standards Act of 1938.
Federal Trade Commission v. Claire Furnace Company, 274 U. S. 160 (1927).

3. On an application for a *subpoena duces tecum* by the Administrator of the said Act, the Court should give consideration to the question of whether the industry sought to be investigated is subject to the Act.

Securities & Exchange Commission v. Tung Corporation, 32 Fed. Supp. 371 (D. C. N. D. Ill. 1940).
Perkins, Secretary of Labor v. Endicott Johnson Corporation, 37 Fed. Supp. 604 (D. C. N. D. N. Y. 1941) 40 Fed. Supp. 254.
Interstate Commerce Commission v. Brimson, 154 U. S. 447 (1894).

4. The subpoena issued herein is violative of the rights guaranteed by the Fourth Amendment to the Constitution of the United States.

Federal Trade Commission v. American Tobacco Co., 264 U. S. 298 (1924).
Cudahy Packing Company v. U. S., 15 Fed. (2nd) 133 (1926).

ARGUMENT.

I.

The Court below erred in holding that the Administrator issued the purported subpoena duces tecum herein and in failing to dismiss the action because the said subpoena shows on its face that it is a nullity, not having been issued by the Administrator himself as required by the Act.

The lower Court erroneously held that the Administrator of the Wage and Hour Division issued a *subpoena duces tecum* in the case at bar, whereas the record plainly shows that such was not the case. (R. 69 & 70.)

The basis of the case at bar is a purported *subpoena duces tecum*, which is attached to the Administrator's petition and is designated as Exhibit "D". This document attempts to order respondent to bring from Shreveport to New Orleans, a vast number of books, records and documents and is simply signed Robert T. Amis, an officer designated by the Administrator of the Wage and Hour Division. (R. 47 and 48.) It bears no seal or other identifying symbol nor does it attempt to disclose any other official authorization.

The so-called subpoena is of no value or effect as the law does not authorize Mr. Amis or anyone other than the Administrator himself to issue subpoenas. The sole provision for the issuance of subpoenas is contained in Section 9 of the Act, which provides:

"For the purpose of any hearing or investigation provided for in this Act, the provisions of Sections 9

and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16th, 1914, as amended (U. S. C., 1934 edition, Title 15, secs. 49 and 50) are hereby made applicable to the jurisdiction, powers and duties of the Administrator. . . ."

Section 9 of the Federal Trade Commission Act reads:

"For the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; **and the commission shall have power to require by subpoena the attendance and testimony of witnesses** and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence."

A simple reading of the foregoing paragraphs will conclusively show that the Administrator alone can issue a subpoena under the statute.

Section 9 of the Federal Trade Commission Act clearly distinguishes the duties and rights of the Commission itself and the duties and rights of its agent or agents. The agent or agents are given the right to have access at reasonable times to documentary evidence for the purpose of examination and the right to copy it. The Commission alone is given the power to require by subpoena the at-

tendance and testimony of witnesses and the production of all documentary evidence relating to any matter under investigation; examiners of the Commission are given the right to sign subpoenas.

Section 9 of the Fair Labor Standards Act merely substitutes for the word "Commission" and the words "any member of the Commission", the word "Administrator," so that the Administrator alone is given the right to require by subpoena the attendance and testimony of witnesses and the production of documentary evidence relating to any matter under investigation and is given solely the further right of signing subpoenas. His subordinates, who occupy the positions of agent or agents, or ~~members and~~ examiners of the Commission are given the right to have access to, for the purpose of examination, and the right to copy documentary evidence. They are given the further right to administer oaths, examine witnesses and receive evidence.

The verbiage of the Act is clear. There is no ambiguity. The Administrator has only the rights given to him by the statute. Congress alone can enlarge his power and alone can grant him the right of substitution. The Act gives him no such right.

Section 4 (c) of the Act provides:

> "The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place."

Section 4 of the Act in its entirety deals with the creation in the Department of Labor of a Wage and Hour Division under the direction of an Administrator, states the amount of his compensation, provides the appointment and qualifications of his employees, designates where the Administrator shall conduct his principal office and states that he or his duly authorized representative respectively may exercise any or all of his powers at any place and provides for annual reports to Congress covering his activities.

Subsection (c) of Section 4 merely articulates that the Administrator shall have his principal office in the District of Columbia, and the right to exercise his powers in any place. It gives his duly authorized representatives the right to exercise their powers in any place.

The detailing of the powers of the Administrator and the powers of his representatives is delegated to subsequent parts of the statute. It would be unreasonable to assume that Congress would have so lightly passed over the grant of such important authority, especially in view of the fact that a vast amount of verbiage is used in the statute to cover far less important matters.

If Congress had intended to give the representatives of the Administrator the powers which it conferred on him it would have been an easy matter to have included under the heading of "Definitions" in Section 3 of the act the following:

> Administrator means the duly appointed administrator and his authorized representatives.

Section 4 is an independent section and has no reference to definitions.

Section 4 (c) confers no power of delegation. Other sections of the Act are specific, carefully naming those powers which the Administrator himself must exercise and those which he may delegate. If it were intended by Congress to give to the Administrator in section 4 (c), the power to delegate any or all of his powers, the words used in the statute "or his duly authorized representative" are meaningless for the sections of the Act relating to the Administrator's power must be construed together to form a consistent whole. In *Bowie v. Gonzales*, 117 Fed. (2) 11 (C. C. A. 1st Cir., 1940) it was held that the statute (Fair Labor Standards Act) is remedial and should be liberally construed.

Should we attempt to interpret Section 4 (c) of the Act to be an unlimited authorization to the Administrator to delegate the authority conferred upon him by Congress, many of the subsequent sections of the Act would be meaningless. For example Section 5 requires the Administrator to appoint an industry committee for each industry engaged in commerce or in the production of goods for commerce. It requires the Administrator to designate a chairman in each industry and to do other things in connection with the operation of the said committee.

Section 8 requires the Administrator, among other things, to convene the committee for each industry, to pass on the recommendations of such committees, etc.

It was certainly not intended by Congress to permit the Administrator to delegate these rights. Yet such would be the case if we construed Section 4 (c) to confer an unlimited power of delegation. The powers given him under said sections are those which he alone can exercise.

If Section 4 (c) was intended to permit the Administrator to delegate all of his authority, the section would have been more specific as to whom and for what purposes he could delegate.

The Court went fully into the question of delegation of authority in *Fleming v. Lowell Sun Company*, 120 Fed. (2) 213 (C. C. A. 1st Cir. 1941):

> "It seems most unlikely that Congress, when it enacted § 4 (c), intended to confer such broad powers of delegation upon the Administrator. He, however, recognizing the improbability that Congress intended any such result, asserts that § 4 (c) should be construed as empowering him to delegate not all but only some of his functions. To adopt this construction of the section would, in the first place, require that the words 'any or all' as used therein with reference to the Administrator's powers, be given the meaning of 'some', and, in the second place, if the Administrator may delegate only certain of his functions and duties, which may he delegate and which may he not? The Act itself does not answer this question and neither the Administrator nor the courts may do so without trespassing upon the legislative function. In our view §4 (c) must be construed either as granting full powers of delegation or as granting none."

As we have stated ~~supra~~ hereinafter the original bill passed by the Senate provided for a Labor Standards Board of five members. The Board had power to conduct investigations to determine whether the Act had been violated. Any member of the Board or officers designated by it was empowered to issue subpoenas. (Senate Bill 2475, 75th Congress, 1st Session 1937, passed July 22nd, 1937.)

The bill as passed by the House gave the Secretary of Labor alone the power to issue subpoenas. It contained no authority to delegate. (Senate Bill 2475, 75th Congress, 3rd Session May 24th, 1938, Union Calendar No. 804.)

The Conference Committee in its report did not mention Section 4 (c) but stated with regard to Section 9 the following:

> "Section 9 of the conference agreement confers the necessary powers for the summoning of witnesses and the production of documents for the purpose of any hearing or investigation under the act. It is substantially the same as in the House amendment." (House Rep. No. 2738, 75th Cong., 3rd Sess., p. 32.)

From the very fact that there was a divergence of opinion in the enactment of the original Senate Bill and the House Bill with regard to the primary issue of delegation of authority, it stands to reason that Congress would not have given the Administrator any authorization to delegate his power. If it had so intended this important phase would certainly have been mentioned by the conference committee. Then, too, as we have pointed out above, the House Bill did not authorize any delegation whereas the Senate Bill authorized delegation only to an

officer of the Board. The committee would not have given a broader power than that found in either bill.

The Attorney General himself recognized that the Act itself did not give complete power of delegation in a monograph of his committee on Administrative Procedure on the administration of the Fair Labor Standards Act of 1938, and recognized that an amendment to the Act is desirable:

> "Note 61. This cumbersome arrangement, which necessitates halting the hearing pending the determination of the issue and putting the burden of decision upon an officer unfamiliar at this stage with what is happening at the hearings, is said to be required by the act itself. Section 9 of the Federal Trade Commission Act permits only the Commission to issue subpoenas; it is not clear whether a general power of delegation is provided in the F. L. S. A., although, as noted below, power to issue subpoenas has been vested on one or two occasions in trial examiners at exemption hearings. **If necessary, a statutory amendment is desirable to obviate the present subpoena procedure.** But it is not at all clear that, even if the F. L. S. A. has no general delegation provision, the statute impels the present method. The National Labor Relations Act, for example, authorizes only members of the Board to issue subpoenas. Although in form they are signed by the Board members, trial examiners are furnished with a supply of subpoenas signed in blank. The examiners may issue such subpoenas during a hearing in accordance with specific instructions given by the Board. It should be noted, however, that the arrangement now in effect has raised no problems—simply because no parties

> have exercised their right to press requests for subpoenas in cases where the Administrator has not himself presided." (Monograph of the Attorney General's Committee on Administrative Procedure, Part I.)

With regard to the issuance of *subpoenas duces tecum*, by the Federal Trade Commsision, the practice has been outlined as follows:

> "Supoena duces tecum are * * * considered by the entire Commission, upon verified applications specifying, as exactly as possible, the documents desired and showing their competency, relevancy and materiality." (Monograph of the Attorney General's Committee on Administrative Procedure, Part 6, Federal Trade Commission, Sen. Doc. No. 186, 76th Cong., 3d Sess., p. 18 (1940).)

It was certainly not the intention of Congress to permit commissions to issue to what we might term "roving inspectors" who could harass the public at will. Yet from the instructions given to the representatives of the Wage and Hour Division, we note the following:

> "After an inspector becomes known to the mangement, it will not be necessary for him to go through the procedure of showing his credentials and introducing himself, but as a matter of common courtesy and in order to retain the good will and cooperation of industry, he should make it a practice to stop at the front door and contact someone in authority before proceeding into the plant itself." (1940 Wage and Hour Manual, p. 41.)

Under the Administrator's theory the delegation of power would be so complete that the Regional Director, his

assistants, his subordinates, his attorneys or any one else might be designated officers in the Wage and Hour Division and authorized to issue subpoenas *duces tecum* at will. This would initiate a system which has not been known in this country since before the war of the Revolution and would be far worse than the notorious writs of assistance of Colonial days.

As was said in *Fleming v. Lowell Sun Company (supra):*

> "We find no merit in the Administrator's further argument to the effect that 'the subpoena power simply implements the power of inspection', and, since the latter is delegable (§ 11 (a)), the former must be delegable also. The reason for this is that the powers are not alike. The right to enter and inspect an employer's records and make transcriptions therefrom imposes a less onerous burden than the right to compel an employer to make selection from his own records and produce such of them as are demanded at a hearing, and so Congress may well have intended to surround the exercise of the power to impose the heavier burden with greater safeguards than it thought necessary in the case of the lighter one."

We have previously attempted to point out fatal defects in the subpoena *duces tecum* itself. This document is merely signed by Robert T. Amis, an officer designated by the Administrator. It does not even bear the name "Philip B. Fleming" but merely recites that it has been issued "at the instance of the Administrator, Wage and Hour Division" (R. 47 and 48).

II.

The Court below erred in failing to dismiss the action in view of the requirement of Sec. 4 (b) of the Act that all litigation thereunder must be conducted under the direction and control of the Attorney General of the United States.

The caption of the petition on which this proceeding is based is:

> "Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to the Fair Labor Standards Act of 1938 . . . respectfully applies to this Honorable Court for an order directing Cudahy Packing Company of Louisiana, Ltd., respondent herein, to appear before him, or such representatives as he may designate, to produce documentary evidence and to give testimony, as required by a subpoena duces tecum issued by petitioner, as set forth herein, and as reasons therefor shows the Court . . ." (R. 2.)

The petition then recites that the Administrator

> "authorized David S. Polier and Robert T. Amis officers of the Wage and Hour Division, and each of them, to investigate and gather such data, enter and inspect such places and such records, to subpoena witnesses and records relevant or material to the inquiry, and to perform all other duties appearing in said order authorized by law. A copy of said order is attached hereto, marked 'Exhibit C' and made a part hereof." (R. 5.)

The petition then recites:

> "A subpoena duces tecum duly executed by Robert T. Amis, regional director, pursuant to authority

granted by the Administrator, requiring respondent to appear before Stephen MacRae, an officer of the Wage and Hour Division, United States Department of Labor, Room 516, Carondelet Building, in the City of New Orleans, Louisiana, on the 15th day of April, 1940, at 10 A. M. of that day to testify and produce certain specified books, papers, and documents of respondent was duly served upon respondent, a corporation, by serving a duplicate original copy of the said subpoena duces tecum (a copy of which is attached hereto, marked 'Exhibit D' and made a part hereof)." (R. 5.)

The petition is signed by the following attorneys: George A. McNulty, General Counsel, Irvin J. Levy, Assistant General Counsel, Bessie Margolin, Senior Attorney, and D. Douglas Howard, Associate Attorney. (R. 9.) For verification the petition contains an affidavit of one Henry T. Chambers, whose status is unknown other than that he designates himself as an "Inspector of the Wage and Hour Division of the United States Department of Labor" and a "representative of the Administrator as alleged in the foregoing petition". (R. 10.) Attached to the said petition are Exhibits C and D.

Exhibit C purports to be an "Order for Investigation and Designating Officers for taking testimony". The exhibit purports to designate David S. Polier and Robert T. Amis to investigate, gather data, administer oaths, subpoena witnesses, compel their attendance, etc., and bears the name "Philip B. Fleming, Colonel, Corps of Engineers, Administrator". There is no signature or official seal attached but on the bottom there is a certification that this is "a true copy of the original as signed", by one Nellie M.

Spinle, who simply styles herself "Office of the Administrator". (R. 44-46.)

Exhibit D is what purports to be a *subpoena duces tecum* issued by the Wage and Hour Division of the Department of Labor. It attempts to order Cudahy Packing Company of Louisiana, Ltd., to bring in from Shreveport to New Orleans its books, records and documents, receiving invoices, memoranda of purchases, shipments, etc., for the period October 24th, 1938 to March 23rd, 1940, and it is simply signed "Robert T. Amis", an officer designated by the Administrator of the Wage and Hour Division. (R. 47-48.)

Neither Exhibits C or D bear any seal or other identifying symbols nor do they disclose in any further detail the official character, if any, of the parties who signed them.

On the face of the proceeding at bar, no mention is made of the Attorney General. The cause is entitled "Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, Petitioner, versus Cudahy Packing Company of Louisiana, Ltd., Respondent". There is nothing in the application or the exhibits attached which would show that the Attorney General or any of his authorized representatives are parties of record to the proceeding; that he or his representatives had any knowledge or were consulted concerning the institution or the handling of the proceeding; or that the Attorney General or his authorized representatives exercised in any respect any discretion whatsoever in connection with the proceeding. Until this matter reached the

Circuit Court of Appeals, there was no attempt made to show any grant of authority under which the petitioners were allegedly operating. In his brief filed in the Circuit Court of Appeals, the Administrator for the first time alleges that a certain letter was written on January 18th, 1939, by Frank Murphy, the then Attorney General, to Elmer F. Andrews, the then Administrator of the Wage and Hour Division, setting out a purported arrangement with regard to the handling of litigation under the Fair Labor Standards Act. The letter was never introduced in evidence nor was a copy even presented for the guidance of the Court. On the face of the pleadings, therefore, nothing is at hand which might tend to prove that there was even a delegation of authority if the ~~Administrator~~ Attorney General had the right so to do, which we deny.

The words used in the Fair Labor Standards Act "subject to the direction and control of the Attorney General" were not contained in the original draft of the bill. The original bill which eventually became the Fair Labor Standards Act and which was passed by the Senate on July 22nd, 1937, provided for a Labor Standards Board of five members and gave the Board power to appoint Attorneys (Sec. 3 (d)) stipulating "Attorneys appointed under this section may at the direction of the Board appear for and represent the Board in any case in Court." Under this set up, the contemplated litigation by the Board was not made subject to the direction and control of the Attorney General (S. 2475, 75th Cong., 1st Sess., see Cong. Record, Vol. 81, part 7, page 7953). When the bill proceeded in due course to the Committee on Labor of the House of Representatives, this sentence was deleted and the following

was inserted: "In all litigation the Board shall be represented by the Attorney General or by such attorney or attorneys as he may designate." (S. 2475 as reported to the House of Representatives on August 6th, 1937. 75th Cong., 1st Sess., p. 11, See Vol. 3, House Reports, Report #1452.)

Then the Fair Labor Standards Act as passed by Congress was drafted by a conference committee which took into consideration the above expressed divergent views of the Senate and House. (See House Report 2738, 75th Cong., 3rd Sess., P. 3.) In developing the existing Act, which we know as the Fair Labor Standards Act, the committee undoubtedly took into consideration the fact that a single administrator was appointed in lieu of the five members called for originally in the Act passed by the Senate. So in order to limit to a certain extent, the authority of the Adminsitrator, and as a counterbalance, the Act provided that all "litigation shall be subject to the direction and control of the Attorney General".

This limitation of authority was purposely placed in the Act. In appointing a one-man commission—an administrator—Congress carefully chose not to give this one-man board *carte blanche* authority but in matters involving the judiciary plainly stated that these should be subject to the control and direction of the Attorney General. In so doing, Congress simply vested in the chief law enforcement officer of the United States the duty and obligation of being familiar with all litigation initiated by the Administrator and imposed on the Attorney General the obligation of handling said litigation and the further obligation of subjecting such litigation to his direction and control.

Section 9 of the Fair Labor Standards Act adopts Sections 9 and 10 of the Federal Trade Commission Act, September 16th, 1914, as amended. Sections 9 and 10 of the Federal Trade Commission Act give certain rights to the members of the Federal Trade Commission as a body and other rights to the individuals who make up the commission. In establishing the Federal Trade Commission, the congressional act provided: "a commission is created and established, to be known as the Federal Trade Commission (hereinafter referred to as the Commission), which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than *three of the commissioners* shall be members of the *same political party.*" Further "the commission shall have an official seal which shall be judicially noticed". With regard to remuneration, the Act provided that "each Commissioner shall receive a salary . . . payable in the same manner as the salary of the *Judges* of the Courts of the United States". (15 U. S. C. Sec. 41, *et seq.*)

Some idea of the dignity with which Congress intended to clothe the members of the Federal Trade Commission can be gathered from the above. Now with regard to the *modus operandi* of the statute, Section 9 above referred to gave any member of the Commission the right to sign subpoenas, gave *members* and *examiners* of the Commission the right to administer oaths, to examine witnesses and to receive evidence but with regard to the issuing of writs of mandamus which could command or compel a person or corporation to comply with the provisions of the Act or orders of the Commission in pursuance thereof

the Federal Trade Commission Act provided that *these* could be obtained only upon the application of the Attorney General at the request of the Commission itself.

We are again required to compare the purpose which Congress had in view when it enacted the Fair Labor Standards Act. If the citizens of our union were to be forced into Court the will of one man alone should not govern, but he should have recourse to and be guided by our chief law enforcement officer—the Attorney General.

In the makeup of the Federal Trade Commission, Congress went so far as to exercise care that the Commission should not be composed entirely of one political party. By inference it clothed the members of the Commission with the dignity of Judges but even then in the enforcement of the statute, the Act provided that the Commission itself could make application only at the request of the Attorney General. How much more so should the Administrator, who is in effect a one-man commission, be required to bring proceedings upon the application of the Attorney General of the United States?

As we have before noted the purported subpoena on which this entire matter is predicated was simply signed by "an officer designated by the Administrator of the Wage and Hour Division" of the Department of Labor. It contained no reference to the Attorney General of the United States nor did it bear the signature of the Administrator of the Wage and Hour Division, nor was it under seal. The suit to enforce the subpoena which was brought in the name of the Administrator and signed by a representative of the Wage

and Hour Division of the United States Department of Labor contained no reference to the Attorney General of the United States and bore no seal. The original record did not attempt to explain any purported delegation of authority nor is there on file any evidence showing any purported delegation of authority. It is patent then that the Court could not entertain the suit at bar. There is a positive non-compliance with the plain provisions of the statute.

The Fair Labor Standards Act purposely incorporated Section 9 of the Federal Trade Commission Act and, by so doing, it adopted by reference the judicial interpretations which were in existence with regard to said Act. At the time of the enactment of the Fair Labor Standards Act of 1938, there was in existence a decision of the United States Supreme Court rendered on April 18th, 1927, in the matter entitled *Federal Trade Commission, et al. vs. Claire Furnace Company, et al.*, 274 U. S. 160 (1927). This decision plainly outlined the procedure to be followed in enforcing the terms of the Federal Trade Commission Act.

Mr. Chief Justice Taft delivered the opinion, from which we quote:

> "This was a bill in equity brought in the Supreme Court of the District of Columbia on behalf of twenty-two companies . . . in the coal, steel and related industries, to enjoin the Federal Trade Commission from enforcing or attempting to enforce orders issued by that Commission against the complainant companies, requiring them to furnish monthly reports of the cost of production, balance sheets, and other voluminous information in detail, upon a large variety

of subjects relating to the business in which complainant corporations are engaged."

The Commission purported to act pursuant to its resolution calling for the investigation in question by virtue of its authority under Section 6 (a) and (b) of the Federal Trade Commission Act.

> "Purporting to proceed under this resolution the Commission served separate notices upon the twenty-two appellees and many other corporations, engaged in mining, manufacturing, buying and selling coal, coke, ore, iron and steel products, etc., which directed them to furnish monthly reports in the form prescribed showing output of every kind, itemized cost of production, sale prices, contract prices, capacity, buying orders, depreciation, general administration and selling expenses, income, general balance sheet, etc. Elaborate questionnaires, accompanying these orders, asked for answers revealing the intimate details of every department of the business, both intrastate and interstate. . . . The concluding paragraph of the notice declared—'The purpose of this report is to compile in combined or consolidated form the data received from individual companies and to issue currently in such form accurate and comprehensive information regarding changes in the conditions of the industry both for the benefit of the industry and of the public.'
>
> "Appellees did not comply with the inquiries in the notices but filed in the Supreme Court, District of Columbia, their joint bill against the Commission and its members, wherein they set out its action, alleged that it had exceeded its powers, and asked that all defendants be restrained 'from the enforcement of said orders, and from requiring answers to said

questionnaires, and from taking any proceedings whatever with reference to the enforcement of compliance with said orders and answers to said questionnaires;' also for general relief.

"Without questioning the appellee's right to seek relief by injunction, the appellants answer admitted issuing of the orders, claimed authority therefor under § § 6 and 9, Federal Trade Commission Act, September 26th, 1914, c. 311, 38 Stat. 717, 721, 722, etc.

"Defendants admit that no complaint has been filed or is now pending before the Commission against any of complainants for a violation of § 5 of the trade commission act, but aver that the activities sought to be enjoined were instituted and are sought to be carried on under the provision of said trade commission act.

"That one purpose of the requirements made in this case is the gathering of complete information, which is necessary in the proper regulation through publicity of the true facts as to the interstate business of the industry. That such purpose cannot be properly performed without the acquisition of the complete facts, etc.

"The cause was heard upon motion to strike the answer from the files because it contained no adequate defense. The trial court concluded that, as the propounded questions were not limited to interstate commerce, but asked also for detailed information concerning mining, manufacture and intrastate commerce, they were beyond the Commission's authority. 'The power claimed by the Commission is vast and unprecedented. The mere fact that a corporation engaged in mining, ships a portion of its product to other states does not subject its business of produc-

tion or its intrastate commerce to the powers of Congress.' It accordingly held the answer insufficient and, as defendants declined to amend, granted the injunction as prayed. The Court of Appeals affirmed this action. 285 Fed. 936, 52 App. D. C. 202. The case, here by appeal has been twice argued. . . .

"The action of the commission here challenged must be justified, if at all, under the paragraph of § § 6 and 9, Act of September 26th, 1914, copied below, and the only methods prescribed for enforcing orders permitted by any of these paragraphs are specified in § § 9 and 10. **They are applications to the Attorney General to institute an action for mandamus, and proceedings by him to recover the prescribed penalties.** . . .

'Section 9. That for the purpose of this Act the Commission or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the Commission may sign subpoenas and members and examiners of the Commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing and in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence. . . .

Upon the application of the Attorney General of the United States, at the request of the Commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the Commission made in pursuance thereof. . . .

"There was **nothing which the Commission could have done** to secure enforcement of the challenged orders **except to request the Attorney General to institute proceedings for a mandamus or supply him with the necessary facts for an action to enforce the incurred forfeitures.** If, exercising his discretion, he had instituted either proceeding the defendant therein would have been fully heard and could have adequately and effectively presented every ground of objection sought to be presented now. Consequently, the trial court should have refused to entertain the bill in equity for an injunction.

"We think that the consent of the parties was not enough to justify the Court in considering the fundamental question that has been twice argued before us. **It was intended by Congress in providing this method of enforcing the orders of the Trade Commission to impose upon the Attorney General the duty of examining the scope and propriety of the orders, and sifting out of the mass of inquiries issued what in his judgment was pertinent and lawful before asking the Court to adjudge** forfeitures for failure to give the great amount of information required or to issue a mandamus against those whom the orders affected and who refused to comply. The wide scope and variety of questions, answers to which are asked in these orders, show the wisdom of requiring the chief law officer of the Government **to exercise his sound dis-**

cretion in designating the inquiries to enforce which he shall feel justified in invoking the action of the Court. In a case like this, the exercise of this discretion will greatly relieve the court and may save it much unnecessary labor and discussion. The purpose of Congress in this requirement is plain and we do not think that the court below should have dispensed with such assistance. Until the Attorney General acts, the defendants cannot suffer, and when he does act, they can promptly answer and have full opportunity to contest the legality of any prejudicial proceedings against them. That right being adequate, they are not in a position to ask relief by injunction. The bill should have been dismissed for want of equity."

Justice McReynolds commented that in his opinion the Commission went beyond any power granted by Congress.

The case at bar is almost identical with that of the *Claire Furnace Company* and the exclusive remedy for the enforcement of the order is by request of the Administrator to the Attorney General of the United States to proceed under the provisions of Section 9 of the Federal Trade Commission Act.

In this case the Administrator seeks to obtain similar information as that desired in the *Claire Furnace* case but by a different procedure. The Administrator attempted to delegate his authority to representatives who could search at random and at will and obtain the information desired. His procedure is not in accordance with the principles enunciated by this Court. The order for the purported *subpoena duces tecum* is ancillary to the investigation. The real purpose of the proceeding is to en-

force compliance with the order for investigation. If the subpoena should be enforced such a ruling would in fact amount to an enforcement of the order for investigation.

As we have stated above, no evidence has been introduced to show that the ~~Administrator~~ attorney General was even consulted in the case at bar; that he issued any order or performed any part of the duty imposed upon him by Sections 4 (b) and 9 of the Act, on that he followed the rule of the *Claire Furnace* case or sifted out what in his judgment was pertinent and lawful for the purposes of the purported investigation.

The all embracing nature of the case at bar bears out the principle laid down in the *Claire Furance Company* case: "the wisdom of requiring the chief law officer of the government to exercise a sound discretion in designating the inquiries to enforce which he shall feel justified in (invoking) the action of the Court".

In the case at bar the Administrator required the production of extensive records. As we have set out above the lower court was imposed upon to sift out the necessary documents and without any showing whatsoever by the Administrator and on the face of the papers refused to order the production of any and all books, records, documents, receiving slips, invoices, or memoranda of purchases and shipments received by respondent during the period from October 24th, 1938, to March 23rd, 1940, and any and all invoices, shipping receipts, copies of bills of lading, or other documents, records or memoranda pertaining to goods sold, shipped, delivered,

transported or offered for transportation by respondent during said period of time.

The Administrator in his brief filed with the Circuit Court of Appeals explained the strange procedure which he took in the lower court by making the following statement:

> "The Attorney General has exercised the authority conferred upon him by Section 4 (b) and has expressly authorized the legal staff of the Administrator to handle the Administrator's legal work, including civil litigation under the Act. The Attorney General has reserved to himsef the right to take such part in the conduct of cases in the circuit courts of appeal and the state courts of last resort as he deems to be in interest of the United States. He has also reserved to himself the control and direction of litigation carried to the Supreme Court. This arrangement between the Attorney General and the Administrator for the conduct of civil litigation under the Act is set forth in a letter, dated January 18th, 1939, from Frank Murphy, then Attorney General, to Elmer F. Andrews, the Administrator of the Wage and Hour Division. This arrangement is clearly a matter of internal administration between the Government officials involved. It is not, as claimed by appellant, a fact which must be affirmatively established as a condition to the district courts' jurisdiction." (Brief for Philip B. Fleming, Administrator in C. C. A. 5th Circuit pp. 43-44.)

As we have previously noted the record is bare of any evidence in this regard but for the purpose of argument, assuming that this letter does actually exist, there is a grave question as to whether the Attorney General actually

could divest himself of the responsibility imposed upon him by the statute. The reference made to the letter in the Administrator's brief on appeal states that the Attorney General reserved to himself the right to take such part as he might deem to be of interest to the United States in the conduct of cases in the Circuit Courts of Appeal and the State Courts of last resort, also the control and direction of litigation carried to the Supreme Court. It is very difficult to determine the meaning of a letter which respondent has never seen or to construe its terms but if the very words used by the Administrator in explaining the contents of the letter mean anything, a showing should have been made to the effect that the Attorney General has taken cognizance of this litigation and has authorized the Administrator to appear.

Again referring to the aforesaid letter, we find that it is purported to be dated January 18th, 1939, from Frank Murphy, who was **then** the Attorney General to Elmer F. Andrews, who was **then** the Administrator of the Wage and Hour Division. Neither of these parties were occupying said positions at the time this suit was instituted; therefore, any reference to the purported letter or even the introduction thereof would have been inadmissible if the plaintiff had attempted to produce and introduce it in evidence.

In construing Section 9 of the Federal Trade Commission Act, it is necessary to construe all of the paragraphs as a whole. The Court cannot separate paragraphs one, two and three from paragraph four. The application of the Administrator in the pending litigation shows that he has

plainly ignored the requirement of the statute which he invoked and that the District Court was therefore without jurisdiction to entertain his application.

III.

The Court below erred in refusing to determine the issues raised by petitioner in its pleadings with respect to the denial by petitioner of the interstate nature of its business.

In paragraph III of its application to the District Court for a subpoena *duces tecum*, the Administrator sets out the following:

> **"Respondent, a corporation organized and existing under and by virtue of the laws of the State of Louisiana, is a branch of the Cudahy Packing Company of Chicago, Illinois, a corporation organized and existing under and by virtue of the laws of the State of Maine having numerous branches throughout the country. Respondent in its establishment located at Shreveport, Louisiana, is engaged in the general business of manufacturing, receiving, unloading, handling, distributing and selling meat products and other packing house products. A major portion of the goods received by respondent is shipped from sources without the State of Louisiana and respondent ships, transports and delivers the goods manufactured or handled by it to retail stores situated in the States of Louisiana, Texas and Arkansas. The respondent is in these and other ways an employer of employees engaged in interstate commerce and in the production of goods for interstate commerce, within the meaning of the Act".** (R. 3 and 4.)

In its motion to dismiss, petitioner sets out that "it is not engaged in the production of goods for commerce or in the transportation of goods in commerce, or that it is not engaged in any of the classes of businesses governed by the Fair Labor Standards Act of 1938".

Notwithstanding the square presentation of the issue of whether or not petitioner was in a business subject to or covered by the said Act, the District Court did not go into the question regarding the nature of petitioner's business. The simple thesis hereof is that where, as in the instant case, an industry seeks to resist the efforts of the Administrator to examine its records on the grounds that such industry is not subject to the Act, the said industry has a right to show in the very Court before whom the Administrator makes an application for such examination, that it is not so subject.

The Administrator purports to act under the provisions of Section 11 (a) of the Act, which provides as follows:

> "The Administrator or his designated representative may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in *any industry subject to this Act*. . . ." (Italics supplied.)

Nor is this the only section of the Act in which it is made clear and unequivocal that the authority or jurisdiction of the Administrator is limited exclusively to employees and industries engaged "in commerce" and "in the production of goods for commerce" (Secs. 6 (a) and 7 (a) of the Fair Labor Standards Act).

In footnote No. 5 to the opinion of the Court in the case of *Jewell Tea Company v. Williams, et al*, 118 Fed. (2nd) 202 (C. C. A. 10 Cir., 1941), is contained an interesting exposition of the legislative history emphasizing the restrictive nature of the Act:

> "5. Senate Bill 2475, as introduced and as it passed the Senate, was limited to employees engaged in interstate commerce or in the production of goods for interstate commerce. The House, by amendment, broadened the coverage of the bill by requiring time and a half for overtime for all employees of an 'employer engaged in commerce in an industry affecting commerce.' 75th Cong., 3rd Sess., H. Rep., 2182.
>
> "The conference draft of the bill, which was finally enacted into law after the Senate had refused to accede to the House amendment, restored the test of coverage contained in the original Senate Bill, by applying the act to 'employees . . . engaged in commerce or in the production of goods for commerce.' Senator Pepper of Florida, a member of the Conference Committee which drafted the act as adopted, made its limited scope very clear in discussing the terms of Sec. 7 before the Senate. In answer to an objection to the broad scope of the act, he said:
>
> " 'I want it distinctly stated that this proposed law is not applicable to all employees of an industry which itself is engaged in interstate commerce. It is applicable only to those employees who themselves are engaged either in interstate commerce, or the production of goods for interstate commerce, and the contrary theory was definitely rejected by the Committee.' 83 C. R. 9168 (Senate—75th Cong., 3rd Sess., June 14, 1938)."

The Administrator, however, holds the view that he is empowered under Section 11 (a) of the Act: "to investigate and inspect places and records (and make transcription thereof) of employment *in any industry* in which he may deem it necessary . . ." (Italics supplied) (R. 2). Going further than this, but following the same line of thought, the Administrator urges that once he has deemed it necessary to investigate an industry and has requested the authority of one of the Courts of the United States to aid in the carrying out of such an investigation that such Court has no right to inquire whether the one sought to be investigated is subject to the authority of the Administrator. Such a concept is not new but on the contrary has been repeatedly urged upon Federal Courts in the past by administrative agencies.

In the case of *Securities and Exchange Commission v. Tung Corporation of America, et al.*, 32 F. Supp. 371 (D. C. N. D. Ill. 1940), the Commission filed a petition against the defendant stating that it had reasonable grounds to believe that said defendant was engaged in selling unregistered securities and asked for a *subpoena duces tecum* of its records. The defendant denied that it was engaged in interstate selling or that it was selling securities at all.

The Commission contended that the Court had no right to go into the question of whether the defendant was engaged in interstate transactions.

The Court refused to sustain the position of the Commission and at page 373 of the opinion stated:

> "I cannot wholly agree with the Commission on this point whether the Court has the right to inquire into

> the nature of the defndant's business. If the power of the Court is to be invoked to compel obedience to the subpoena it must be made to appear that the commission has reasonable grounds to believe that the respondent is engaged in some activity which the commission is authorized to supervise. And respondents having denied that they are engaged in selling securities or that they do an interstate business or use the United States mails in carrying on their business, they are entitled to a hearing on those questions. The Commission may not have an order on a corner grocer to produce books and documents merely on its allegation that he is engaged in a business that comes within the provisions of the Securities Act of 1933, 15 U. S. C. A. 77, et seq., and that he has violated the terms of that act. **The Commission must at least show that it has reasonable grounds to believe that the person charged is engaged in transactions which come within the purview of the Statute."** (Emphasis supplied.)

In that case the Court also stated that it, through the issuance of an order for a subpoena *duces tecum*, without proof that the defendant was subject to the provisions of the Securities and Exchange Act of 1933, would be aiding the ~~Labor Department~~ in carrying out an "extra-legal inquisition".

In the instant case, the Administrator is not functioning in any judicial or legislative capacity but solely in an executive capacity. He is seeking to compel compliance with the Fair Labor Standards Act and in aid of such an attempt he invokes the authority of the Federal Court to conduct an investigation of petitioner's records. If he were to be permitted to examine these records without re-

gard to the question of coverage, even though resistance is made to his efforts, there would be herein judicial assistance to an "extra legal-inquisition".

Another decision directly in point in this discussion is that of *Perkins, Secretary of Labor v. Endicott Johnson Corporation*, 37 F. Supp. 604 (D. C. N. D. N. Y. 1941), which arises under the Walsh-Healy Act regarding Government contracts. In that case the plaintiff contended that the Court had no jurisdiction under Sec. 5 of the Walsh-Healy Act to determine if the employees were engaged in work on Government contracts. The Court held emphatically to the contrary and at Page 606 stated:

> **"The act in question does not give general investigatory powers. It gives investigatory powers only over factories and employees engaged in the performance of government contracts. Defendants say the records sought do not cover such factories or employees. In this issue they are entitled to a hearing. The court should be reasonably satisfied that the Secretary has authority to inspect before ordering production."** (Emphasis supplied.)

Several months later, the case of *Perkins v. Endicott Johnson Corp.* came up for hearing again before the District Court (40 F. Supp. 254, August 19, 1941) and again the Court held that it had a right to demand proof showing good reason to believe that the records subpoenaed were subject to inspection.

While there are several important distinctions between the Fair Labor Standards Act and the National Labor Relations Act, and it is submitted that the Board set up by the latter act is vested with quasi-judicial powers, yet there are

decisions involving the National Labor Relations Act which show plainly that the Court will go into the question of relevance or coverage when such issue is raised. In the case of *Goodyear Tire & Rubber Company v. National Labor Relations Board* 120 Fed. (2) 450 (C. C. A. 6th Cir., 1941), the Court held that it was open to the company to contend that the documents called for do not relate to the matter in controversy and that such a contention "made in the *answer raises an issue of facts for determination by the Court*, and if determined in its favor that the application of the Board as to documents found not so to relate should be dismissed upon the merits." (Italics supplied) (at page 453 of the opinion).

The Court below, in a previously rendered decision, in the case of *Bradley v. National Labor Relations Board*, 84 Fed. (2) 97 (C. C. A. 5th Cir., 1936), stated the following:

> "Even in advance of a final order by the Board, jurisdiction can regularly be brought under judicial scrutiny, because no subpoena can be enforced, nor any document or book be compelled to be produced, nor any other order enforced save by appeal to a court which would then and there refuse to sanction or aid any clear usurpation."

This Court has recognized the doctrine herein set out.

Myers v. Bethlehem Shipbuilding Corp. Ltd., 303 U. S. 41 (1939)

Interstate Commerce Commission v. Brimson, 154 U. S. 447 (1894)

Federal Trade Commission v. Claire Furnace Company, 274 U. S. 160 (1927)

Jones v. Securities & Exchange Commission, 298 U. S. 1 (1936).

In the case of *Interstate Commerce Commission v. Brimson (supra)*, this Court said:

> ". . . Suffice it in the present case to say that as the Interstate Commerce Commission, by petition in a Circuit Court of the United States, seeks, upon grounds distinctly set forth, an order to compel appellees to answer particular questions and to produce certain books, papers, etc., in their possession, it was open to each of them to contend before that court that he was protected by the Constitution from making answer to the questions propounded to him; or that he was not legally bound to produce the books, papers, etc., ordered to be produced; or that neither the questions propounded nor the books, papers, etc., called for relate to the particular matter under investigation, nor to any matter which the Commission is entitled under the Constitution or laws to investigate. These issues being determined in their favor by the court below, the petition of the Commission could have been dismissed upon its merits." (At page 479.)

Were the Administrator correct in his position that he has general investigatory power over all industries, regardless of their nature, then the Court would be functioning in no other respect except as a rubber stamp approving all applications of the Administrator for the issuance of subpoenas. This is not and cannot be the law. The Court has a right to determine whether the inquiry sought to be made is legitimate. As was said by this Court in the case of *Jones v. Securities (supra)* at Page 26:

> ". . . The citizen, when interrogated about his private affairs, has a right before answering to know why the inquiry is made; and, if the purpose disclosed

is not a legitimate one, he may not be compelled to answer."

In the case of *Myers v. Bethlehem Shipbuilding Corporation (supra)* this Court laid down the principle by which the District Court and the Court below should have been guided. At Page 49 of the report, this Court pointed out (speaking of the National Labor Relations Board) that:

> ". . . The Board is even without power to enforce obedience to its subpoena to testify or to produce written evidence. To enforce obedience it must apply to a District Court; and to such an application appropriate defence may be made."

The Federal Trade Commission is composed of five members. There is little question that this Commission is clothed with quasi-judicial functions. In this connection it is interesting to note Rule 17 of the Rules of Practice of the Federal Trade Commission which provides as follows:

> "Rule 17—
>
> *"Documentary—*
>
> "Where relevant and material matter offered in evidence is embraced in a document containing other matter not material or relevant and not intended to be put in evidence, such immaterial or irrelevant parts shall be excluded, and shall be segregated insofar as practicable.
>
> *"Objections—*
>
> "Objections to the evidence before a trial examiner, a commissioner or the commission shall be in short form, stating the grounds of objections relied upon,

> and the transcript shall not include argument or debate thereon except as ordered by the trial examiner, a commissioner or commission. Rulings on such objections shall be a part of the transcript."

Here we note that provision is made for objection to the introduction of documentary evidence before the Federal Trade Commission and that a rule is made on such objection and an order entered in the transcript with regard to such ruling.

In the case of the Fair Labor Standards Act, one individual, the Administrator, assumes full power, and before him there is no objection permissible or any provision for recording an objection. The Administrator's demand, arbitrary or not, must receive full compliance.

In the case at bar the petitioner is a Louisiana corporation. In *Frank J. Abadie et al. v. Cudahy Packing Company of Louisiana*, 37 Fed. Supp. 164 (D. C. E. D. La. 1941), the Court had occasion to investigate the status of petitioner's branch at New Orleans and in connection therewith stated as follows:

> "Having in mind the object and purpose of the Act and considering the fact that all of the goods processed at defendant's plant were sold in intrastate commerce and that the goods which it did sell intrastate were the identical products that it had theretofore acquired either locally or from other states, it is not easy to understand how it can be said with any degree of assurance that plaintiff was engaged in the production of goods for commerce when as a fact his employer was not so engaged. * * *"

The failure of the District Court in the instant case to go into the question of whether the employees of petitioner were subject to the provisions of the Fair Labor Standards Act constituted serious error and hence this matter should be dismissed.

Counsel for petitioner feel that this subject would not receive the thorough discussion it merits were they to fail to mention the case of *Fleming v. Montgomery Ward*, 120 Fed. (2) 384 (C. C. A. 7th Cir. 1940). That case and the instant case are clearly distinguishable on the ground that in the former case, there was a plain admission that Montgomery Ward & Company was engaged in a business subject to the Fair Labor Standards Act and a complete absence in the record of any issue regarding coverage. In the instant case, as mentioned above, the issue was clearly raised.

The Administrator has frequently contended that investigations of the nature herein involved are analogous to those of a Grand Jury. In such contention, the Administrator overlooks the fact that in an investigation, the Grand Jury is dealing with a specific commission of crime. In the instant case, there is no allegation of any specific violation by petitioner nor any proof whatsoever that petitioner is even in a position where it could violate the provisions of the Fair Labor Standards Act. To prohibit petitioner from establishing the nature of its business and compel it to produce its records for investigation would be to deprive it of its property without due process of law.

Boyd v. U. S., 116 U. S. 616 (1886).

IV.

The Court below erred in failing to dismiss this action by reason of the fact that the purported subpoena, in its attempt to compel petitioner to permit the Administrator's agents to conduct and exploratory search in its records for the purpose of determining whether or not it has violated the Act, is violative of petitioner's rights as guaranteed by the Fourth Amendment to the Constitution of the United States.

In his application to the District Court for a *subpoena duces tecum*, the Administrator requested all of the payroll records and all of the time records of petitioner's Shreveport plant for the period from October 24th, 1938, to March 23rd, 1940. (R. 7 and 8.) The Administrator also requested shipping records and related documents for the same period (R. 8), but the Court refused to allow the production of these latter records (R. 63).

Let us consider for a moment the basis or ground upon which the Administrator places his demand for the production of the aforementioned records. The application reveals that the Administrator "has reasonable cause to believe" that petitioner is guilty of violating Sections 7, 11 (c), 15 (a) (5) of the Fair Labor Standards Act (R. 4); and further on in the application, the Administrator alleges that the records requested are necessary to determine *whether* petitioner has violated the aforesaid Act.

In short the Administrator bases his demands for these records on the sole ground that they will assist him in establishing violations of the Fair Labor Standards Act.

There is not even a scintilla of evidence in the record that petitioner has violated any of the provisions of the Act nor is there any allegation to the effect that there has been some specific violation of the Act by petitioner. We might go even further and point out that the record does not contain any proof that the Administrator had even a suspicion of violation by petitioner. There is an *ex-parte* affidavit in the record setting out that the Administrator's office had received complaints of violations on the part of petitioner; but this affidavit was ordered stricken from the record.

It is apropos, however, to point out here that notwithstanding the fact that the representatives of the Administrator allegedly had in their possession evidence concerning specific violations of the Fair Labor Standards Act by petitioner that the Administrator neither makes mention thereof in his application for a *subpoena duces tecum* nor does he attempt to introduce evidence to show such violations by petitioner.

The Administrator is seeking in this matter to obtain production of records under Sections 11 (a) and 9 of the Fair Labor Standards Act.

Section 11 (a) provides:

> "The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or

appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. . . ."

Section 9 of the Fair Labor Standards Act provides as follows:

"For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16th, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees."

Section 9 of the Federal Trade Commission Act, as amended is cited on page 10 of this brief.

There is a very great distinction between Section 11 (a) of the Fair Labor Standards Act and Section 9 of the Federal Trade Commission Act. Under the former provision, the Administrator is given the right to investigate regarding conditions "in any industry subject to this Act" and to "inspect . . . such records . . . as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act . . . ". This provision is merely advisory with regard to the procedure that the Administrator may follow in making investigations under the Act where there is no dispute or where there is no controversy. It is entirely conceivable that a great number of industries in this Country which are engaged in commerce or in the production of goods for commerce

might, without objection, permit the Administrator, or his representatives, to examine their records. In such instances, the Administrator is advised that he may extract from such records whatever information he may deem necessary.

The framers of the Act well realized, however, that there would be instances in which there might be some harrasment of businesses or industries sought to be investigated by the Administrator and so these framers wisely included Sections 9 and 10 of the Federal Trade Commission Act regarding "attendance of witnesses and the *production of books, papers and documents*". (Italics supplied.)

Section 9 of the Federal Trade Commission Act does not give the wide power which is found in Section 11 (a) of the Fair Labor Standards Act. Under Section 9 of the Federal Trade Commission Act, the power to require by subpoena the production of records is limited to "such documentary evidence relating to any matter under investigation". In another part of this Act, it is provided that the Commission (the Administrator in the instant case) may invoke the aid of any Court of the United States in requiring *"the production of documentary evidence"* (Italics supplied).

We find, therefore, that in the instance where the Administrator makes an investigation without objection, he may take anything out of the records which he may deem necessary, while in the instance where he is compelled to proceed by subpoena, he must confine himself to *documentary* evidence and then only where same relates to a matter under investigation.

The Administrator has lost sight completely of the distinction between the two provisions set out hereinbefore. He comes into these proceedings and seeks to subpoena all and any records which he deems necessary to his investigation. This is in conformity with the general policy of the Administrator in conducting investigations. We quote from a statement made public in *"Labor Information Bulletin"* Volume 7, Number 11, issued by the United States Department of Labor in November, 1940:

> "Besides inspections made in response to specific complaints, the Division has inaugurated inspection on an industry-wide basis covering all the plants in the following industries: Lumber, hosiery, furniture, wool, leather and luggage goods, and shoes. This has marked the beginning of a program of systematic annual pay-roll inspections which has long been recognized as the most effective method of enforcing the provisions of the law. With this program, the Division no longer needs to wait until some employee registers a complaint. The records tell which of the companies comply with the act, and appropriate action is taken against those companies whose records disclose noncompliance. As a rule, the Wage and Hour Division has been able to obtain enforcement of the law and restitution of back wages to the workers affected through amicable adjustment with the employer. When this procedure fails, recourse is made to civil, or if necessary even criminal suit against recalcitrant employers."

In the matter in controversy herein, the Administrator is attempting to engage in a routine police investigation for the purpose of determining whether or not he will uncover any violations on the part of petitioner through the medium of a subpoena *duces tecum*. This is the very

type of "fishing expedition" heartily condemned in the case of *Federal Trade Commission v. American Tobacco Company* 264 U. S. 298 (1924). In that case, Sections 9 and 10 of the Federal Trade Commission Act were involved and there, as here, the Commission claimed an unlimited power of investigation through the medium of a *subpoena duces tecum*. This Court, through Mr. Justice Holmes said:

> "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire . . . and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime."
>
> * * * *
>
> "It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up."

In that case, too, the Court pointed out that any evidence which the Commission sought to subpoena must be relevant, that is to say, must be documents which are evidence:

> "The right of access given by the statute is to *documentary evidence*,—not to all documents, but to such documents as are evidence. The analogies of the law do not allow the party wanting evidence to call for all documents in order to see if they do not contain it. Some ground must be shown for supposing that the documents called for do contain it. Formerly in equity the ground must be found in admissions in the answer. Wigram Discovery, 2d Ed. sec. 293. We

assume that the rule to be applied here is more liberal, but still a ground must be laid, and the ground and the demand must be reasonable. *Essgee Co. v. United States*, 262 U. S. 151, 156, 157, 67 L. ed. 917, 920, 43 Sup. Ct. Rep. 514. A general subpoena in the form of these petitions would be bad. Some evidence of the materiality of the papers demanded must be produced. *Hale v. Henkel*, 201 U. S. 43, 77, 50 L. ed. 652, 666, 26 Sup. Ct. Rep. 370."

There is no attempt made in this case by the Administrator to lay any reasonable ground or basis for his demands. The Administrator claims for himself a broad sweeping power to examine the records of petitioner by subpoena without any specific charges of violation. As a matter of fact, there is nothing in the record to show that there was even a ground for suspicion that petitioner had violated any provisions of the Fair Labor Standards Act. In this connection the following language used in the *American Tobacco Company* case is strikingly apt and forceful:

"We have considered this case on the general claim of authority put forward by the commission. The argument for the government attaches some force to the investigations and proceedings upon which the commission had entered. The investigations and complaints seem to have been only on hearsay or suspicion; but even if they were induced by substantial evidence under oath, the rudimentary principles of justice that we have laid down would apply. We cannot attribute to Congress an intent to defy the 4th Amendment, or even to come so near to doing so as to raise a serious question of constitutional law. *United States ex rel. Atty. Gen. v. Delaware & R. Co.*, 213 U. S. 366, 408, 43 L. ed. 836, 849, 29 Sup. Ct. Rep. 527; *United States v. Jin Fuey Moy*, 241 U. S. 394, 401,

60 L. ed. 1061, 1064, 36 Sup. Ct. Rep. 658, Ann. Cas. 1917D, 854."

The general unlimited exercise of power sought to be utilized by the Administrator in this case is well characterized in the language employed in the case of *Jones v. Securities Commission*, 298 U. S. 1 (1936), at Page 27:

> "Judge Sawyer, in the course of his opinion (at p. 263), after observing that a bill in equity seeking a discovery upon general, loose and vague allegations is styled 'a fishing bill' and will, at once be dismissed on that ground (Story, Eq. Pl. Par. 325) said: 'A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission without any obligations, upon no fixed principles, and governed by no rules of law or of evidence, and no restrictions except its own will, or caprice, is unknown to our constitution and laws; and such an inquisition would be destructive of the rights of the citizen, and an intolerable tyranny. Let the power once be established, and there is no knowing, where the practice under it would end.'"

To permit the Administrator to exercise without hindrance or curb the sweeping authority which he seeks to impose upon petitioner in this case would be directly violative of the Fourth Amendment to the Constitution of the United States directed against unreasonable searches and seizures. As a matter of fact, the history of the Fourth Amendment shows that it was designed to prevent the very thing which the Administrator seeks to accomplish in this proceeding. The notorious writs of assistance employed by England in the Colonial days of the Eighteenth Century in this Country constituted a prime factor in the revolt against the Mother Country.

These writs were issued to any person on request of the Government authorizing him to search any suspicious place for goods on which duties had not been paid.

These writs were characterized by James Otis, formerly Advocate General to the Crown as:

> "The worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law ever found in an English law book".

After the war for independence was won by the Colonists and the new Constitution submitted to the people for ratification, there arose such a storm of protest for failure to include a bill of rights, that the first ten amendments to the Constitution were passed, including among other things a prohibition against unlawful searches and seizures.

Today, after more than one hundred and fifty years since the adoption of the Fourth Amendment, and in the face of previous refusals on the part of this Court to sanction similar assertions of power, the Administrator is requesting the right, without furnishing reasonable grounds therefor or without showing the revelance of the records requested, to conduct a general exploratory expedition through petitioner's records. We are met here with the same arguments that were utilized in the days of employment of the writs of assistance, namely, that this procedure is followed in the interests of expediency and the proper enforcement of law. It is unnecessary that the Administrator be clothed with this broad power which he demands. No better answer can be made to such an argument than the language used by Mr. Justice Brandeis in his now

famous dissent—in the case of *Olmstead v. U. S.* 277 U. S. 438 (1928):

> "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficient. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."

Also appropriate is the language used in the case of *U. S. v. 1013 Crates of Whiskey Bottles*, 52 Fed. (2d) 49 (1931):

> "Cases like this involve grave danger. The very natural desire of government officers who try to enforce the law to the best of their ability leads them to adopt the most practical and efficient way to do it whenever by some plausible reasoning they can satisfy themselves that no constitutional rights are contravened. But their zeal for the cause in which they have enlisted so often creates in their minds such an emphasis upon the theory that the virtue in the end will justify the means that the fundamental rights of a liberty loving people will be gradually sapped, undermined, and finally destroyed by a subtle, insidious, and persistent narrowing of vital bedrock principles unless courts are steadfast and firm in the preservation of what has been gained through centuries of struggle. The Fourth Amendment which prohibits unreasonable searches and seizures, is one of the pillars of liberty so necessary to a free government that expediency in law enforcement must ever yield to the necessity for keeping the principles on which it rests inviolate. In this spirit alone it is safe to attempt to solve the problem which now confronts us."

> "One of the things, which no great study of the history of the times which led to the adoption of this amendment will reveal, is an abhorrence of searches and seizures based on nothing but the desire to bring to light and into the clutches of the law whatever may, by chance, be found. No period of freedom from such an evil, however long it may be, shall lull us into a false sense of security and lead us to permit this always necessary safeguard of liberty to be weakened in exchange for the temporary advantage of more thorough or certain enforcement of some law, however, beneficial".

It has been held, that there are some businesses which are so deeply impressed with the public interest that their records are open to complete investigation without limitation. Public carriers are the foremost examples of this type of business. *Smith v. Interstate Commerce Commission* 245 U. S. 33 (1917). In the *American Tobacco Company* case, *supra*, the Court pointed out at page 305, that:

> "The mere facts of carrying on a commerce not confined within state lines and of being organized as a corporation do not make men's affairs public, as those of a railroad company may be." (264 U. S. at page 305.)

In the case of *Federal Trade Commission v. Baltimore Grain Co.*, 284 Fed. 886 (District Court Maryland, 1922), affirmed by the United States Supreme Court in 267 U. S. 586 (1925) at page 889, it was said:

> "But so far as concerns nonpublic service corporations, at least, the inquiry in which the commission is engaged, whatever it is, must be more or less de-

finite and restricted in its character, so that the activities of its minor agents, to whom in practice the actual searching must necessarily be confided, can be kept within some bounds."

In the case of private business, such as petitioner's, the regulation must be reasonable and the investigatory power invoked for the purpose of such regulation must also be lawful and be bound by reasonable limitations. Where, as here, an effort is made to defy the plain language of the Fourth Amendment to the Constitution of the United States and the previous adjudications of this Court, there should be strong unequivocal denial of such efforts.

On the score of the issue under discussion herein, Counsel for the Administrator will also rely heavily on the case of *Fleming v. Montgomery Ward, supra.* It is well to mention first that the mere fact that this Court refused certiorari in that case cannot be considered as an affirmation of the decision of the Circuit Court of Appeal, since it is well settled by this Court that the denial of a writ imports no expression of opinion on the merits of the case.

U. S., et al v. Carver 260 U. S. 482 (1922).

With regard to the merits of the *Montgomery Ward* case, it is respectfully submitted that in holding that the Administrator had the power to subpoena the records in that case, the Court completely overlooked the full import of the decision in the *American Tobacco Company* case. No attempt was made to ascertain whether the inquiry was a lawful one, whether any reasonable grounds or basis

had been laid for the demands made and finally whether the documents sought to be produced were relevent and proper. In fact, the Court, in direct contradiction to the *American Tobacco Company* case, held that the Administrator had unlimited power of investigation through the medium of a subpenoa *duces tecum*.

That same Court in the case of *Cudahy Packing Company v. U. S.* 15 Fed. (2) 133 (1926) held:

> "That the demand of the Secretary of Agriculture under the Packers and Stockyards Act for access to and right to copy books of account, records, and memoranda of packing companies was in violation of the Fourth Amendment."

It should be carefully noted that the Packers and Stockyards Act made applicable Sections 9 and 10 of the Federal Trade Commission Act just as does the Fair Labor Standards Act in this case.

In its opinion the court carefully distinguished between the provisions of the statute relating to stockyards which was conceded to be a business of sufficient public concern to justify the investigatory powers claimed and the business of the packers which was found to be like the ordinary private businesses falling within the purview of the Federal Trade Commission Act and hence not subject to the extent of the regulation claimed.

Consequently the decision in reality rested upon the fact that the demands made by the Secretary of Agriculture

were not related to a valid statutory purpose. The court said:

> "It does not here appear that the accounts and records of the packers failed in any degree to comply with the statute. There is no allegation of the slightest impropriety in this regard, and there was pending no complaint or proceeding by the secretary looking toward the change therein as provided in the statute. Indeed, the entire demand is in no degree predicated upon alleged dereliction in any duty or requirement which the statute lays upon the packers, save only the refusal to comply with the demand for inspection and copying. But, says the government, it is evident that without previous inspection it would not be known whether the accounts, etc., were such as are required to be kept, or would justify the Secretary in requiring installment of his own system. Legislative intent to permit unlimited inspection of books, records, papers, etc., to learn if there may be cause to believe that a highly penal statute has been transgressed will not lightly be presumed; and from the fact alone that section 401 requires the proper keeping of accounts, records, etc., and in case of failure to do so authorizes the Secretary to prescribe and require to be installed his own system, it does not follow that the Secretary was empowered, in advance of any complaint or charge of impropriety or violation, to examine and copy all books, records, papers, etc."

and

> "We cannot see wherefore the unlimited inspection of books, records, memoranda, and correspondence without process of law in some pending proceeding, respecting every detail and relation of an interstate

business, is any the less unreasonable in the case of the packers under the Packers and Stockyards Act than in the case of corporations generally subject to the jurisdiction of the Federal Trade Commmission, and we perceive no reason wherefore the cited authorities respecting cases arising under the Federal Trade Commission Act are not here applicable and binding." (15 F. (2d) at pages 136-137.)

The case of *Bartlett, Frazier Co. v. Hyde* 65 F. (2d) 350 (C. C. A. 7th 1933) decided by the same Court which decided the *Montgomery-Ward and Cudahy Packing Company v. U. S.* cases and cited by said Court in the *Montgomery-Ward* case, dealt with a matter arising under the Grain Futures Act and in that case the Court plainly held that dealing in Grain Futures was affected with a deep public interest. It is also to be noted that the plaintiff and others were engaged in the very business specifically sought to be regulated.

Another decision upon which the Circuit Court relied, in the *Montgomery-Ward* case, is that of *Nebbia v. New York*, 291 U. S. 502 (1934). Neither the *Bartlett, Frazier* nor the *Nebbia* cases arose under the provisions of Section 9 and 10 of the Federal Trade Commission Act. The *Nebbia* case arose under the New York State Milk Control Act, where, on the basis of legislative findings of fact, the Court held that the milk industry was affected with a public interest.

It is, therefore, the considered view hereof that the Court in the *Montgomery-Ward* case failed to distinguish properly between that case and the *Bartlett, Frazier* case and

ignored its previous decision in the *Cudahy* case; and finally misapplied completely the doctrine in the *American Tobacco Company* case.

To take any other view with regard to the manner in which the Administrator is seeking to proceed in this case and to hold that the Fair Labor Standards Act confers the broad general powers of investigation through the medium of a subpoena *duces tecum* upon the Administrator would result in raising serious constitutional doubts with respect to the Fair Labor Standards Act. It is fundamental that Courts will, whenever possible, seek to maintain the validity or constitutionality of the law. To hold that the Administrator possesses the broad power for which he contends would be tantamount to holding the act unconstitutional. To hold otherwise would be in aid of maintaining the constitutionality thereof.

CONCLUSION.

We believe the record clear and emphatic on all of the issues raised herein.

There is nothing in the record to show that the Administrator issued the subpoena *duces tecum* herein. On the contrary the record plainly exhibits the fact that this subpoena was issued by a subordinate of the Administrator. Under the requirements of Sections 9 and 10 of the Federal Trade Commission Act incorporated under Section 9 of the Fair Labor Standards Act, the Administrator, and

only the Administrator, could issue the subpoena *duces tecum* herein.

The Attorney General of the United States did not take any part in the conduct of this case nor is there any evidence to show that this controversy was subject to his control and direction. Under Section 4 (b) of the Fair Labor Standards Act of 1938, this matter was subject to the direction and control of the Attorney General. There is no discretion reposed under the terms of the Act in either the Administrator or the Attorney General; the aforesaid Section is mandatory and not permissive.

Whereas in the District Court, the issue of whether petitioner's business was one subject to the terms and provisions of the Fair Labor Standards Act was clearly raised, the Court refused to consider that it was necessary, before ordering the production of any records, to determine whether petitioner was in fact subject to any compulsion under the aforesaid Act.

Finally, the Record shows that the Administrator presented no evidence or any grounds to show that he had reasonable cause to believe that petitioner had violated any provision of the aforesaid Act; that the subpoena was broad and sweeping in its requirements, evidently the primary purpose being to ascertain whether petitioner had violated the Act. Such a subpoena *duces tecum* is repugnant under the Fourth Amendment to the Constitution of the United States and the order calling for the production of records herein should be disallowed.

WHEREFORE, petitioner prays that the judgment of the Circuit Court of Appeals of the United States for the Fifth Circuit be reversed and the order for the production of petitioner's records entered by the United States District Court for the Eastern District of Louisiana, New Orleans Division, be set aside and that the case be remanded with directions to dismiss the proceeding.

Respectfully submitted,

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APPENDIX.

Constitutional Provision Involved.

The Constitutional Provision involved herein is the Fourth Amendment to the Constitution of the United States providing as follows:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Statutory Provisions Involved.

The statutory provisions involved are those embraced in the Fair Labor Standards Act of 1938 (52 Stat. 1060; U. S. C. Title 29, Sec. 201 *et seq.*) and in Sections 9 and 10 of the Federal Trade Commission Act (38 Stat. 722; U. S. C. Title 15, Sec. 41 *et seq.*)

A copy of the Fair Labor Standards Act is bound in as a part of this appendix.

Sections 9 and 10 of the Federal Trade Commission Act provide that:

> "Sec. 9. For the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investi-

gated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

"Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

"Any of the District Courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

"Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.

"The commission may order testimony to be taken by deposition in any proceeding or investigation pend-

ing under this Act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

"Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

"No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided*, That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

"Section 10. Any person who shall neglect or refuse to attend and testify, or to answer any lawful

inquiry or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

"Any person who shall wilfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this Act, or who shall wilfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any corporation subject to this Act, or who shall wilfully neglect or fail to make, or cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corporation, or who shall wilfully remove out of the jurisdiction of the United States, or wilfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall wilfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of contempt jurisdiction, to a fine of not less than $1,000 nor more than $5,000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

"If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice

of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

"Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the direction of the Court."

[PUBLIC—No. 718—75TH CONGRESS]

[CHAPTER 676—3D SESSION]

[S. 2475]

AN ACT

To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Act of 1938".

FINDING AND DECLARATION OF POLICY

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

DEFINITIONS

SEC. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying,

the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Chief of the Children's Bureau certifying that such person is above the oppressive child-labor age. The Chief of the Children's Bureau shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Chief of the Children's Bureau determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodg-

ing, or other facilities are customarily furnished by such employer to his employees.

ADMINISTRATOR

SEC. 4. (a) There is hereby created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this Act referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of $10,000 a year.

(b) The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this Act and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In the appointment, selection, classification, and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.

(d) The Administrator shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable.

INDUSTRY COMMITTEES

SEC. 5. (a) The Administrator shall as soon as practicable appoint an industry committee for each industry engaged in commerce or in the production of goods for commerce.

(b) An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on.

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reasonable per diem, which the Administrator shall by rules and regulations prescribe, for each day actually spent in the work of the committee,

and shall in addition be reimbursed for their necessary traveling and other expenses. The Administrator shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

(d) The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations.

(e) No industry committee appointed under subsection (a) of this section shall have any power to recommend the minimum rate or rates of wages to be paid under section 6 to any employees in Puerto Rico or in the Virgin Islands. Notwithstanding any other provision of this Act, the Administrator may appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 6 to all employees in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce, or the Administrator may appoint separate industry committees to recommend the minimum rate or rates of wages to be paid under section 6 to employees therein engaged in commerce or in the production of goods for commerce in particular industries. An industry committee appointed under this subsection shall be composed of residents of such island or islands where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of Puerto Rico and the Virgin Islands. In determining the minimum rate or rates of wages to be paid, and in determining classifications, such industry committees and the Administrator shall be subject to the provisions of section 8 and no such committee shall recommend, nor shall the Administrator approve, a minimum wage rate which will give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands.

No wage orders issued by the Administrator pursuant to the recommendations of an industry committee made prior to the enactment of this joint resolution pursuant to section 8 of the Fair Labor Standards Act of 1938 shall after such enactment be applicable with respect to any employees engaged in commerce or in the production of goods for commerce in Puerto Rico or the Virgin Islands.[1]

MINIMUM WAGES

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

[1] Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8,

(5) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers.[1]

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

(c) The provisions of paragraphs (1), (2), and (3) of subsection (a) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands engaged in commerce or in the production of goods for commerce only for so long as and insofar as such employee is covered by a wage order issued by the Administrator pursuant to the recommendations of a special industry committee appointed pursuant to section 5 (e).[1]

MAXIMUM HOURS

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

[1] Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks,

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand hours during any period of fifty-two consecutive weeks, or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), or any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

WAGE ORDERS

SEC. 8. (a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from

time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

(c) The industry committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

(d) The industry committee shall file with the Administrator a report containing its recommendations with respect to the matters referred to it. Upon the filing of such report, the Administrator, after due notice to interested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report, if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section; otherwise he shall disapprove such

recommendations. If the Administrator disapproves such recommendations, he shall again refer the matter to such committee, or to another industry committee for such industry (which he may appoint for such purpose), for further consideration and recommendations.

(e) No order issued under this section with respect to any industry prior to the expiration of seven years from the effective date of section 6 shall remain in effect after such expiration, and no order shall be issued under this section with respect to any industry on or after such expiration, unless the industry committee by a preponderance of the evidence before it recommends, and the Administrator by a preponderance of the evidence adduced at the hearing finds, that the continued effectiveness or the issuance of the order, as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry.

(f) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. No such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give to interested persons general notice of such issuance.

(g) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested persons.

ATTENDANCE OF WITNESSES

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

COURT REVIEW

SEC. 10. (a) Any person aggrieved by an order of the Administrator issued under section 8 may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Administrator be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon the Administrator, and thereupon the Administrator shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part, so far as it is applicable to the

petitioner. The review by the court shall be limited to questions of law, and findings of fact by the Administrator when supported by substantial evidence shall be conclusive. No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings by reason of the additional evidence so taken, and shall file with the court such modified or new findings which if supported by substantial evidence shall be conclusive, and shall also file his recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Administrator's order. The court shall not grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety or sureties satisfactory to the court for the payment to the employees affected by the order, in the event such order is affirmed, of the amount by which the compensation such employees are entitled to receive under the order exceeds the compensation they actually receive while such stay is in effect.

INVESTIGATIONS, INSPECTIONS, AND RECORDS

SEC. 11. (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Chief of the Children's Bureau may, for the purpose of carrying out their respective functions and duties under this Act, utilize

the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

CHILD LABOR PROVISIONS

SEC. 12. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided*, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

(b) The Chief of the Children's Bureau in the Department of Labor, or any of his authorized representatives, shall make all investigations and inspections under section 11 (a) with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 17 to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this Act relating to oppressive child labor.

EXEMPTIONS

SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or (3) any employee employed as a seaman; or (4) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or

byproducts thereof; or (6) any employee employed in agriculture; or (7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14; or (8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published; or (9) any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions contained in this section; or (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or (11) any switchboard operator employed in a public telephone exchange which has less than five hundred stations.[1]

(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act. 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

(c) The provisions of section 12 relating to child labor shall not apply with respect to any employee employed in agriculture while not legally required to attend school, or to any child employed as an actor in motion pictures or theatrical productions.

LEARNERS, APPRENTICES, AND HANDICAPPED WORKERS

SEC. 14. The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe, and (2) the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under section 6 and for such period as shall be fixed in such certificates.

PROHIBITED ACTS

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any

[1] Amendment provided by Act of August 9, 1939 (Public No. 344, 76th Congress. 53 Stat. 1266).

goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11 (c), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a) (1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

PENALTIES

SEC. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The count in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

INJUNCTION PROCEEDINGS

SEC. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15.

RELATION TO OTHER LAWS

SEC. 18. No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act. No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.

SEPARABILITY OF PROVISIONS

SEC. 19. If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Approved, June 25, 1938.